No. 89-531

(3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MOUNTAIN STATES TELEPHONE AND TELEGRAPH CO.,
d/b/a MOUNTAIN BELL, a Colorado corporation,
Petitioner,

v.

DISTRICT COURT, CITY AND COUNTY OF DENVER,
STATE OF COLORADO, and
THE HONORABLE WILLIAM G. MEYER,
One of the judges thereof,
Respondents.

**On Petition for a Writ of Certiorari
to the Supreme Court of Colorado**

MOTION FOR LEAVE TO FILE BRIEF FOR CHEVRON CORPORATION AS AMICUS CURIAE AND BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF FOR CHEVRON CORPORATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Pursuant to Rule 36 of this Court, Chevron Corporation requests leave to file the accompanying brief as *amicus curiae* in support of petitioner. Counsel for petitioner has consented to the filing of this brief, but counsel for respondents has refused consent.

The issue raised by the Petition for Certiorari is whether a court may compel a defendant to use its

monthly billing envelopes to disseminate a class notice to its customers, solely for the purpose of reducing the plaintiffs' cost of giving notice. In *Pacific Gas & Electric Co.* v. *Public Utilities Commission*, 475 U.S. 1 (1986) ("*PG&E*"), this Court upheld a company's right under the First Amendment to control its communications with its customers by refusing to use its billing envelopes to disseminate the views of third parties. The Colorado Supreme Court's decision that petitioner Mountain Bell nevertheless has no right to refuse to include a class notice in its billing envelopes represents a significant departure from this Court's decisions.

Chevron operates a large credit card network, mailing statements and other information to more than four million customers throughout the nation each month. Chevron's monthly mailings are frequently its only source of direct communication with its customers. For that reason, Chevron carefully selects the information included in its billing envelopes in order to ensure that it promotes or at least does not detract from the relationship Chevron has attempted to build with its customers.

If allowed to stand, the decision below would significantly diminish Chevron's and every other business' First Amendment right to communicate freely with its customers. Forcing a company to carry its opponent's message constitutes a serious invasion of its right to choose what it will and will not say to its customers. That is true whether the opponent's message is a political statement, as it was in *PG&E*, or whether it is a set of allegations put forth in ongoing litigation, as in the case at bar. In addition, the threat of such forced communications is likely to have a chilling effect on future communication, as businesses consider whether to communicate with their customers on a broad variety of matters as they have traditionally done, or whether to minimize their communications in order to eliminate the kind of "extra space" in their billing envelopes that plaintiffs seek to take advantage of here.

The issues presented in the petition concern all businesses that communicate on a regular basis with their customers. For that reason, Chevron urges the Court to grant its motion for leave to file the accompanying brief as *amicus curiae* in support of petitioner.

Respectfully submitted,

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Dated: October 30, 1989

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BRIEF FOR CHEVRON CORPORATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

Chevron operates a large credit card network, mailing statements and other information to more than four million customers throughout the nation each month. As described in the accompanying motion for leave to file this *amicus* brief, the decision of the Colorado Supreme Court threatens the First Amendment rights of Chevron and many other businesses to communicate freely with their customers through the use of their own billing systems.

ARGUMENT

THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *PACIFIC GAS AND ELECTRIC* BECAUSE IT FAILS TO RECOGNIZE THE BURDEN IMPOSED ON PETITIONER BY THE FORCED DISSEMINATION OF ITS OPPONENTS' MESSAGE THROUGH PETITIONER'S BILLING SYSTEM.

This is a class action in which petitioner Mountain States Telephone and Telegraph Company ("Mountain Bell") is accused of violating Colorado antitrust laws. The complaint also seeks to void certain contracts Mountain Bell entered into with its customers on grounds of fraud, breach of contract and claimed violations of the Colorado deceptive trade practices law. In accordance with the Colorado class action rule, which is identical to Rule 23 of the Federal Rules of Civil Procedure, the trial court ordered notice to be sent to potential class members before any decision had been made on the merits of plaintiffs' claims. Plaintiffs are apparently ready, willing and able to pay the $500,000 it would cost for them to mail notices to the class. Nevertheless, the trial court ordered Mountain Bell to include the class notice in one of its monthly billing statements, in order to reduce the cost of giving notice to approximately $300,000. Petn. at 9.

The notice approved by the trial court recites plaintiffs' allegations of misconduct, stating that Mountain Bell is accused, among other things, of engaging in fraud and deceptive practices. As is customary in such notices, Mountain Bell's general denial of these allegations is stated, without explanation. Petn. at 35a.

Mountain Bell objected to being compelled to include the class notice in its customer mailings. Mountain Bell argued in the courts below that such an order would force it to carry its opponents' message in violation of its First Amendment rights. The Colorado Supreme Court rejected these arguments, holding that there was no burden on

Mountain Bell's First Amendment rights and that the trial court's order was justified by the state's interest in the cost-effective management of class cases.

As demonstrated below, the Colorado Supreme Court was wrong on both counts. Forcing Mountain Bell to include class notices in its billing envelopes does impose significant burdens on its exercise of First Amendment rights. In addition, there is no important, let alone compelling, public interest that justifies the imposition of that burden.

A. Petitioner's First Amendment Rights Were Impermissibly Burdened By The Court's Order.

The Colorado Supreme Court recognized that in *Pacific Gas & Electric Co.* v. *Public Utilities Commission*, 475 U.S. 1 (1986) ("*PG&E*"), this Court held that a corporation could not be compelled to use its billing system to deliver a third party's message to its customers. The Colorado court also recognized that forced association with another person's opinions imposes a significant burden on First Amendment rights. Petn. at 17a-18a. The court distinguished *PG&E*, however, on the ground that the class notice Mountain Bell would be required to put in its billing envelopes reported the fact of plaintiffs' allegations in a neutral manner, without suggesting that Mountain Bell had admitted any misconduct. The court held that under these circumstances there was no forced association with the plaintiffs' views and no burden on Mountain Bell's First Amendment rights.

There are two difficulties with the Colorado Supreme Court's reasoning. First, the fact that the notice describes plaintiffs' claims of misconduct as "allegations" does not make those claims any less hostile to Mountain Bell. This Court has held on a number of occasions that the state may not compel a person to use his own property to convey a message with which he disagrees. That is true even if the recipient of the message is likely to understand that

it represents the opinions of a person other than the property owner.[1]

Second, the Colorado Supreme Court's reasoning completely ignores the very real risk of misunderstanding created by the use of Mountain Bell's billing envelopes to convey the class notice. A customer opening a bill would ordinarily assume that every piece of paper contained in the envelope was approved and endorsed by the company sending the bill. When a customer reads in a notice sent by the company that it has been accused of fraud and deceptive practices, that accusation is likely to gain credibility because of its perceived source. That is particularly true where the notice simply states that the company has generally denied the allegations of wrongdoing, without elaborating on the company's position. A reader briefly glancing through his mail, who does not understand the intricacies of class notice procedures, might well conclude that a company that notifies its customers that it has been accused of fraud but does not explain its side of the story must be guilty as charged.

The forced use of Mountain Bell's property to disseminate the plaintiffs' accusations of misconduct thus inevitably puts pressure on Mountain Bell to speak in order to counter those accusations. As Justice Powell noted in his

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[1] Mountain Bell is in the same position as the motorists in *Wooley* v. *Maynard*, 430 U.S. 705 (1977), who were forced to use their automobiles to carry the state's message, and the newspaper in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), which was forced to provide a forum for opposing views. In both of those cases and in *PG&E* as well, it could be argued that no one reasonably believed that the speech in question was endorsed by the person whose property was being used to convey it. Indeed, in *PG&E*, the insert was specifically required to carry a disclaimer stating that it did not represent the views of the utility. See 475 U.S. at 15 n.11. Nevertheless, this Court held that the forced utilization of property to carry a message with which the owner disagreed was an impermissible burden on the owner's First Amendment rights.

opinion for the plurality in *PG&E*, pressuring a corporation to speak on a particular issue burdens its First Amendment rights just as surely as would prohibiting it from speaking. 475 U.S. at 15-16. Indeed, the dilemma created by the mailing of the class notice in Mountain Bell's own envelopes would arguably be worse than the difficulty encountered by the utility in *PG&E*. When it was forced to send out statements by its political opponents, the utility in *PG&E* at least had the option of using its own mailings to respond to those statements. Mountain Bell, however, might well be prohibited from communicating with class members about its opponents' litigation position except through court-approved notices. See *Kleiner* v. *First National Bank*, 751 F.2d 193 (11th Cir. 1985) (upholding sanctions against defendants' attorneys who solicited opt-outs from potential class members).

As Mountain Bell points out in its petition, the Colorado Supreme Court's decision conflicts not only with *PG&E*, but also with the Seventh Circuit's decision in *Central Illinois Light Co.* v. *Citizens Utility Board*, 827 F.2d 1169 (7th Cir. 1987). In that case, the Seventh Circuit held that a utility could not be forced to include in its billing envelopes information soliciting memberships on behalf of its political opponents—even if the solicitation was done in a completely neutral manner. So too in this case, Mountain Bell should not be forced to use its billing envelopes as a vehicle for its opponents' solicitation of support for a class action.[2]

[2] In addition to the short-term burdens imposed on Mountain Bell's First Amendment rights, the Colorado Supreme Court's decision may also have broad chilling effects on other businesses. If using a billing system that creates "empty space" puts a company at risk of being forced to carry someone else's message, it might well decide to choose a different system. A system that eliminated the empty space, however, such as the use of postcards or one-piece mailers, would require the company to sacrifice its own ability to communicate with its customers on matters of general and commercial concern.

B. There Is No Public Interest That Justifies The Burden Imposed On Petitioner's First Amendment Rights.

In order to justify a burden on First Amendment rights, the state must ordinarily demonstrate that it is necessary to serve a compelling state interest. *PG&E*, 475 U.S. at 19. In this case, the Colorado Supreme Court reduced the level of scrutiny applied by characterizing the whole matter as involving commercial speech. As Mountain Bell points out in its petition, the fact that the litigation involves the commercial relationship between Mountain Bell and its customers does not transform any statement concerning that litigation into commercial speech. Petn. at 14-17. Furthermore, as Mountain Bell also points out, even if the class notice could be considered commercial speech, that hardly permits the application of a relaxed standard of scrutiny. Forced access to Mountain Bell's billing envelopes cannot be justified on the ground that *plaintiffs* wish to engage in commercial speech. Petn. at 15. Indeed, characterizing the notice as a form of commercial speech should have led the Colorado Supreme Court in exactly the opposite direction, since there is by definition no public interest in promoting the commercial interests of any particular individual or group.

Whatever level of scrutiny is applied, however, there is no state interest that justifies burdening Mountain Bell's First Amendment rights by compelling it to mail class notices in its billing envelopes. The Colorado Supreme Court focused on the state's interest in ensuring efficient litigation of numerous small claims through the use of class actions. Although the state clearly has such an interest, it is simply not at issue here.

There has never been any suggestion that the plaintiffs in this case would be unable to continue with the action if they were not permitted to use Mountain Bell's billing envelopes to give notice to the class. Plaintiffs are apparently ready, willing, and able to finance the cost of a separate notice. The issue is thus whether

plaintiffs (or their attorneys) can avoid advancing an extra $200,000 to defray the cost of that notice. As Mountain Bell points out, the state has no interest at all in saving financing costs for a group of private plaintiffs, let alone the kind of interest that would justify the imposition of significant burdens on First Amendment rights.[3]

The Colorado Supreme Court's reliance on the state's interest in promoting efficient use of class actions is ironic, to say the least, in light of that court's adoption of the rule set forth in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), that plaintiffs must advance the costs of providing notice. If the state's interest in promoting class actions is not strong enough to require a defendant to advance the cost of giving notice, how can it be strong enough to justify burdening the defendant's First Amendment rights? That is particularly true where the imposition of the burden on First Amendment rights is entirely fortuitous, depending on the existence of "extra space" in the defendant's billing envelopes and a reasonably close match between the certified class and the defendant's current customers.

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[3] The cost of notice will ultimately be borne by the losing party or will be paid for out of settlement funds if the case is settled. The only cost that cannot be shifted, no matter how the case is ultimately disposed of, is the reputational damage that Mountain Bell will suffer if it is forced to include the class notice in its mailings to customers.

CONCLUSION

The Colorado Supreme Court's decision to reduce the plaintiffs' cost of giving notice by requiring Mountain Bell to include the class notice in its monthly billing statements is at odds with decisions by this Court and the Seventh Circuit prohibiting forced access to private billing systems. In light of this conflict and the importance of the issue to businesses throughout the country, Chevron urges the Court to grant the petition and reverse the decision below.

Respectfully submitted,

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